IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1966

No. ~~905 Misc.~~

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SUPREME COURT, U.S.

DENNIS MANAFORD WHITNEY,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The Opinion of the Third District Court of Appeal, printed at page 55 of the record, is reported at 184 So.2d 207.

The Opinion of the Supreme Court of the State of Florida, printed at page 68 of the record, is reported at 192 So.2d 490.

JURISDICTION

The Court's lack of jurisdiction will be considered in the argument section of this Response.

QUESTIONS PRESENTED

I

WHETHER A SPURIOUS ATTEMPT TO INVOKE THE JURISDICTION OF A STATE SUPREME COURT TO REVIEW THE DECISION OF AN INTERMEDIATE APPELLATE COURT OF FINAL APPELLATE JURISDICTION EXTENDS THE TIME PROVIDED BY 28 USC, SECTION 2101 (d), AS IMPLEMENTED BY RULE 22 OF THE SUPREME COURT RULES, WITHIN WHICH A PETITION FOR WRIT OF CERTIORARI MUST BE FILED IN ORDER FOR THIS COURT TO HAVE JURISDICTION WHEN THE STATE SUPREME COURT WAS PATENTLY WITHOUT JURISDICTION?

II

WHETHER IT IS A DENIAL OF DUE PROCESS FOR THE STATE TO DENY A POST-CONVICTION EVIDENTIARY HEARING IN A CAPITAL CASE MERELY BECAUSE PETITIONER HAS ALLEGED THAT EXTENSIVE PUBLICATION OF HIS TELEVISED EXTRA-JUDICIAL CONFESSION, TOGETHER WITH OTHER PREJUDICIAL PUBLICITY, DEPRIVED HIM OF A FAIR TRIAL ON THE QUESTION OF WHETHER THE JURY WOULD RECOMMEND MERCY WHEN THE RECORD CONCLUSIVELY REFUTES SAID ALLEGATION?

III

WHETHER THE PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN THAT HIS COURT-APPOINTED COUNSEL REFUSED TO REQUEST A CHANGE OF VENUE THOUGH REQUESTED TO DO SO BY THE PETITIONER?

STATUTES INVOLVED

The following Constitutional provisions, statutes, and rules are submitted as being pertinent to the issues:

28 USC, Section 1257
28 USC, Section 2101 (d)
Rule 22 of U. S. Supreme Court Rules
Article V, Section 4, Constitution of State of Florida
Section 913.08 (1), Florida Statutes
Florida Criminal Procedure Rule No. 1, 24 F.S.A., Chapter 924, Appendix (Pocket Supplement)

The pertinent provisions thereto are either set out in the brief or are copied verbatim in the Appendix, which is attached hereto.

STATEMENT OF THE CASE

The petitioner, in that section of the Petition entitled "History of the Case," has accurately presented the facts of this case as reflected by the record and insofar as said facts are pertinent to the issues presently before this Court. However, in that section of the Petition entitled "Statement of Facts," the petitioner has stated as true certain matters, which have been pleaded, but not proved. In any case, the matters contained in the Statement of the Facts are unnecessary to a determination of the merits of the Petition. Consequently, the respondent adopts the petitioner's "History of the Case" as its Statement of the Facts.

ARGUMENT

Title 28 USC, Section 2101 (d) provides as follows:

> "The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court."

This statute is implemented by Rule 22 of the Rules of this Court, which provides in pertinent part as follows:

> "A petition for writ of certiorari to review the judgment of a state court of last resort in a criminal case shall be deemed in time when it and the certified record required by Rule 21 are filed with the clerk within ninety days after the entry of such judgment. A justice of this court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding sixty days."

These time limits are jurisdictional, Cherami v. Cantrelle, 287 U.S. 568.

Title 28 USC, Section 1257 provides in pertinent part as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . . .
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The order or judgment of the "highest court of a State in which a decision could be had" is controlling as to the

running of the time. Where the highest State court has jurisdiction to review a decision of a lower State court, but refuses to do so, the time runs from the date of the refusal to review, American Railway Express Company v. Levee, 263 U.S. 19. On the other hand, respondent contends, where the State Supreme Court does not have jurisdiction to review the decision of an intermediate appellate court of final jurisdiction, the time begins to run from the judgment of the intermediate appellate court. It is respondent's further contention that a spurious attempt to invoke the jurisdiction of the State Supreme Court does not permit the time to be computed from the date the Supreme Court refuses to take jurisdiction.

If a State Supreme Court is without jurisdiction to review the judgment of an intermediate State appellate court, the judgment of the intermediate State appellate court is the judgment of the highest court of the State in which a decision in the suit could be had. Under such circumstances, where the petition for writ of certiorari or writ of error is directed to the State Supreme Court, the petition or appeal will be dismissed, Western Union Telegraph Company v. Priester, 276 U.S. 252; Randall v. Board of Commissioners of Tippecanoe County, 261 U.S. 252; Norfolk & Suburban Turnpike Company v. Virginia, 225 U.S. 264; Western Union Telegraph Company v. Hughes, 203 U.S. 505; Lane v. Wallace, 131 U.S. ccxix, Appendix, 26 L.Ed. 703; Miller v. Joseph, 17 Wall. 655; See also Annotation 7 L.Ed.2d 1085.

The time for filing a petition for writ of certiorari from this Court to the intermediate State appellate court is not tolled by the filling of a petition for writ of certiorari to the State Supreme Court when the Supreme Court is without jurisdiction to review the decision of the intermediate State appellate court. The case relied upon by the petitioner, American Railway Express Company v. Levee, supra, is not in point because there the Supreme Court of the State of Louisiana had discretionary jurisdiction, but refused to exercise it. That is, the State Supreme Court had jurisdiction to review the decision of the lower court if it wished, but refused to do so. Under such circumstances, it was necessary to apply to the State Supreme Court prior to invoking the jurisdiction of this Court, and the time would not begin to run until after the State Supreme Court refused to exercise its jurisdiction. However, in Florida, as will be seen, the Supreme Court has the discretion to issue its writ of certiorari, but only after certain jurisdictional requirements are met.

The situation in Florida is analogous to that contained in Matton Steamboat Company v. Murphy, 319 U.S. 412. There the applicable federal statute provided that no appeal could be brought before the Supreme Court for review unless the application for the appeal was made within three months after the entry of the judgment. The appellant made a timely application to the Chief Judge of the highest State

court for leave to appeal to this Court. The Chief Judge denied the application. Shortly after the three months following the entry of the judgment had expired, an associate justice of this Court allowed the appeal. This Court, however, dismissed the appeal saying, in effect, that the pendency of the application to the Chief Judge of the State court did not toll the running of the time.

The certiorari jurisdiction of the Supreme Court of Florida is limited by Article V, Section 4 of the Constitution of the State of Florida, which provides in pertinent part as follows:

> ". . . The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, . . ."

The decision of the Third District Court of Appeal did not affect a class of constitutional or state officers, and no certificate of great public interest was issued by that court. The petitioner, therefore, invoked the jurisdiction of the Supreme Court of Florida on the basis of an alleged conflict of decisions. Unless one of these jurisdictional requirements was met, the Supreme Court of the State of Florida was without jurisdiction to review the decision of the Third District Court of Appeal.

Such a conflict of decisions may conceivably arise either from the adoption of opposing rules or from the

application of the same principal to reach a different result upon the same facts, Nielsen v. City of Sarasota, (Fla. 1960) 117 So.2d 731; Florida Power & Light Company v. Bell, (Fla. 1959) 113 So.2d 697. No conflict of decisions within the meaning of Article V, Section 4 of the Constitution of the State of Florida can be said to exist between the decision of the Third District Court of Appeal and the cases cited in petitioner's petition for writ of certiorari from the Supreme Court of Florida (R 60). Therefore, the Supreme Court of the State of Florida denied the petition for writ of certiorari because it, unlike the Supreme Court of Louisiana in American Railway Express Company v. Leeve, supra, did not have jurisdiction. American Railway Express Company v. Leeve, supra, involved a failure to exercise jurisdiction. The case at bar involved a total absence of jurisdiction. Under such circumstances, the time for filing the petition for writ of certiorari begins to run as of the date of the decision of the intermediate appellate court.

Had the petitioner been honestly in doubt as to the jurisdiction of the Supreme Court of the State of Florida, he could have, in an abundance of caution, followed the procedure outlined in Matton Steamboat Company v. Murphy, supra, and filed a petition for writ of certiorari from the Supreme Court of the State of Florida, and from this Court. It is respectfully submitted, however, that the petitioner

entertained no doubt as to the jurisdiction of the Supreme Court of the State of Florida, and that said petition was filed solely for purposes of delay.

The Third District Court of Appeal of the State of Florida, was, under the facts of the case at bar, the highest State court in which a decision could be had. This fact was, or should have been, obvious to the petitioner. The time within which to file the petition for writ of certiorari, in order to vest this Court with jurisdiction, began to run, therefore, from the date of the entry of the decision of the Third District Court of Appeal. This time has long since expired because the petitioner made a spurious assault upon the jurisdiction of the Florida Supreme Court. This Court, being without jurisdiction, must dismiss the petition for writ of certiorari.

POINT II

IT IS NOT A DENIAL OF DUE PROCESS FOR THE STATE TO DENY A POST-CONVICTION EVIDENTIARY HEARING IN A CAPITAL CASE MERELY BECAUSE PETITIONER HAS ALLEGED THAT EXTENSIVE PUBLICATION OF HIS TELEVISED EXTRA-JUDICIAL CONFESSION, TOGETHER WITH OTHER PREJUDICIAL PUBLICITY, DEPRIVED HIM OF A FAIR TRIAL ON THE QUESTION OF WHETHER THE JURY WOULD RECOMMEND MERCY WHEN THE RECORD CONCLUSIVELY REFUTES SAID ALLEGATION.

Inasmuch as no evidentiary hearing was held, the respondent is unable to admit or deny petitioner's allegations with respect to adverse pre-trial publicity, including broadcasts and telecasts of tape-recorded confessions made by the petitioner to law enforcement agencies. However, to

the purpose of determining whether an evidentiary hearing is required under Florida Criminal Procedure Rule No. 1, all well-pleaded allegations of fact must be taken as true unless conclusively refuted by the record. The record did not refute nor confirm appellant's allegations in this regard. (See Florida Criminal Procedure Rule No. 1 on page 2 of the Appendix.)

It is respondent's position simply that the record in the case at bar conclusively establishes that the petitioner was able to obtain a fair trial before an impartial jury irrespective of any alleged pre-trial publicity. It is essentially the respondent's contention that the mere fact of adverse pre-trial publicity, including telecasts and broadcasts of the petitioner in the act of confessing his guilt to the crime charged (if such were the case), does not automatically require a change of venue. It is respondent's further contention that where the record conclusively establishes that the petitioner was able to choose a fair and impartial jury after having exhausted only seven of ten pre-emptory challenges and after having examined only 48 of 150 veniremen, he cannot be said to have been denied a fair trial because of prejudicial publicity.

It is true that this Court has found instances in which a showing of actual prejudice is not a prerequisite to reversal. In Rideau v. Louisiana, 373 U.S. 723, this Court enunciated a rule that the televising of a defendant in

the act of confessing to a crime was inherently invalid under the due process clause of the Fourteenth Amendment even without a showing of prejudice or a demonstration of the nexus between the televised confession and the trial.

In Turner v. Louisiana, 379 U.S. 466, two deputy sheriffs, who were the principal witnesses for the prosecution and who testified in detail concerning the crime charged and evidence including a confession connecting Turner to it, were also assigned the duty of shepherding the jury during a three day trial. The deputies drove the jurors to a restaurant for meals and to their lodgings each night. The deputies ate with them, conversed with them, and did errands for them. This Court struck down the conviction on the ground that prejudice was inherent in the trial. In Estes v. Texas, 381 U.S. 532, the Court struck down a conviction after a trial of great notoriety because the trial had been televised. The Court there stated:

> ". . . It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process. . . ."

In Sheppard v. Maxwell, ____ U.S.___, 16 L.Ed.2d 600, this Court held that no showing of identifiable prejudice to the accused was required where there had been intense adverse pre-trial publicity (amounting to a campaign to "get" Sheppard) and the trial itself, because of the freedom granted to

members of the press, took on a "Roman holiday" atmosphere so as to preclude the possibility of a fair trial.

While a showing of actual prejudice is not a prerequisite to reversal when the circumstances surrounding a trial are so gross as to present a probability that prejudice will result, such a result is not mandatory because of the existence of a certain amount of prejudicial pretrial publicity including taped telecasts and broadcasts of the defendant in the act of confessing the crime charged where the record reflects a fair and impartial jury.

This Court has considered the effect on a jury of pretrial publicity concerning the confession of guilt on two occasions. In Irvin v. Dowd, 366 U.S. 717, Irvin's counsel moved for a change of venue on the grounds of certain press releases stating that Irvin had confessed to six murders, which had received extensive news coverage. Irvin used up all of his pre-emptory challenges during a voir dire, which lasted four weeks. The panel consisted of 430 persons. The Court excused 268 on challenges for cause. Two-thirds of the members of the jury finally selected, before hearing any testimony, admitted to possessing a belief in his guilt. This Court held that Irvin's detention and sentence of death were void. In Rideau v. Louisiana, supra, a televised interview between the sheriff and Rideau consisting of interrogations by the sheriff and admissions by Rideau that he perpetrated a recent robbery, kidnapping, and murder was broadcast over

the local television stations into the community in which Rideau was tried. Based upon the alleged prejudicial effect of the televised interview, Rideau's counsel moved for a change of venue, which Motion was denied. After having exhausted all of his pre-emptory challenges, the trial court denied challenges for cause of three jurors, who stated on voir dire that they had seen and heard the television interview on at least one occasion. This Court held that the trial amounted to a denial of due process and accordingly reversed.

It is significant to note that in Irvin and Rideau, a change of venue was requested, all pre-emptory challenges were exhausted, and after having exhausted all pre-emptory challenges, members of the jury were shown to have been in some way prejudiced. This Court would not have reversed had the record in those cases established that Irvin and Rideau had been able to obtain a fair trial in front of an impartial jury that was willing to render a verdict based solely on the evidence presented in court, despite the fact that there had been prejudicial pre-trial publicity including the television broadcasts.

In the case at bar, the petitioner was arrested on March 5, 1960, and allegedly made his televised confession on the following day. (See petitioner's "Statement of Facts") Petitioner was not tried until June 28, 1960. No change of venue was requested. Petitioner exercised only seven of the

ten pre-emptory challenges afforded him under Section 913.08 (1), Florida Statutes, (R 492, 493). Of 150 veniremen, it was only necessary to examine 48 upon voir dire to obtain a qualified jury of twelve men (R 489). It is, therefore, apparent from a reading of the record (R 258-445) that a fair and impartial jury was selected with little difficulty.

The record reflects that the jury that was selected was, in fact, impartial. The jurors were admonished by the prosecutor on a number of occasions that they could not be influenced by anything that they might have heard outside of the courtroom. Illustrative of such admonition is the following:

> "MR. GERSTEIN: Now, some of you may have read in the newspaper or seen over television or heard something over the radio about this case. Regardless of what you may have heard or read outside of this courtroom, the only thing upon which you can base your verdict in this case on is what comes to you from this witness stand. You cannot be influenced by anything else. That is the only thing on which you can base your verdict." (R 258)

Each juror selected was questioned as to whether he had formed any opinions from the news coverage of the case. Each juror selected answered that he had not. The following colloquy is illustrative:

> "MR. SWAN: Have you read anything about this, Mr. Duncan, this particular case?
>
> "MR. DUNCAN: No, sir.
>
> "MR. SWAN: Have you seen or heard anything about this particular case?

"MR. DUNCAN: Not any more than what the newspapers said.

"MR. SWAN: Have you read what the newspapers said about this?

"MR. DUNCAN: The headlines of it. I didn't read the details.

"MR. SWAN: Mr. Moss, have you ever expressed an opinion as to the guilt or innocence of this defendant to anyone?

"MR. MOSS: No, sir, I haven't.

"MR. SWAN: On this case, have you, sir, Mr. Naylor?

"MR. NAYLOR: No, sir.

"MR. SWAN: Have you? Excuse me, is it Mendheimer?

"MR. MENDHEIM: Mendheim.

"MR. SWAN: Excuse me, Mendheim. Have you expressed or formed an opinion as to the defendant's guilt or innocence?

"MR. MENDHEIM: No, I haven't formed an opinion. I just read the papers. I read where he was tried in Palm Beach.

"MR. SWAN: Have you formed an opinion as to this man's guilt?

"MR. MENDHEIM: No. I form no opinion, because I haven't heard no testimony yet.

"MR. SWAN: But what you read or have seen or have heard or television before you came in this courtroom, Mr. Mendheim, is what I am asking you.

"MR. MENDHEIM: No. I have formed no opinion." (R 334-335)

Finally, the jurors were asked the following:

"Lady and gentlemen of the jury, of the prospective jury, under your oath you will not be influenced by anything on the outside of this case; is that correct?

"THE JURORS: Yes, sir." (R 436)

It is apparent from the record that the jurors met the requirement laid down in Irvin v. Dowd, supra.

> "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or the innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." (Citations omitted)

An examination of the sum total of the voir dire examination of the jurors finally placed in the jury box indicated, without equivocation, that they could give the appellant a fair and impartial trial.

In summary, it can be said that the petitioner alleged in his Motion to Vacate Judgment and Sentence pursuant to Criminal Procedure Rule No. 1 that there had been extensive adverse pre-trial publicity including a taped broadcast and telecast of him in the act of confessing the crime charged. The trial court properly denied appellant's Motion to Vacate because the record reflected that, irrespective of the truth of said allegations, the petitioner was able to obtain a fair trial before an impartial jury which was willing to render a verdict based solely upon the evidence presented in Court. In short, the record reflects that

if there was prejudicial pre-trial publicity it had no effect upon the petitioner's right to a fair trial. Under such circumstances, this Court will not reverse a conviction merely because of prejudicial pre-trial publicity.

POINT III

PETITIONER WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN THAT HIS COURT APPOINTED COUNSEL REFUSED TO REQUEST A CHANGE OF VENUE THOUGH REQUESTED TO DO SO BY THE PETITIONER.

It is submitted that the record of the voir dire examination reflects that appellant's attorneys decided, based upon the answers that they received during the voir dire examination, that they were able to select a fair and impartial jury in Dade County despite the pre-trial publicity. The fact that this decision was reached is spotlighted by the fact that no change of venue was requested, the jury was selected after having examined only 48 of 150 veniremen, and that the jury was selected after having only used seven of ten pre-emptory challenges.

Assuming solely for purposes of argument that this was a tactical blunder and that counsel would have been well advised to move for a change of venue as requested by the petitioner, no grounds for relief have been alleged.

> "Trial counsel must make many decisions of an almost infinite variety in the course of a criminal trial; whether to advise a plea to a lesser offense; whether to object; whether to offer a witness of possibly doubtful credibility or with a criminal record; whether to risk crystallising the view of the judge at that point by a motion for directed

before the defense testimony is in; whether to advise the defendant to take the stand and subject himself to cross examination; how to argue the case to the jury; whether to advise the defendant not to go to trial at all but rather to rely upon the mercy of the court. All these and more are practical questions and very real questions. Bad judgment, or even good but erroneous judgment, may result in adverse effects. These are simple facts of trial; they are not justiciable issues. . . .

"If a movant under Section 2255 makes no allegations of ineffectiveness or incompetence of counsel, save in matters normally within the realm of counsel's judgment, he is not entitled to a hearing. Under such circumstances a hearing would be useless, an inexcusable waste of time, energy and money, because even if the movant proved what he alleged he would not be entitled to relief. The substantial considerations we have discussed forbid that a useless formality, fraught with serious consequences to the administration of law, be indulged to no purpose." Mitchell v. U.S., C.A.D.C., 259 F.2d 787, 792,794.

It is respectfully submitted that the decision whether to move for a change of venue is a matter normally within the realm of counsel's judgment. A laymen is no more qualified to decide whether he can obtain a fair trial in a certain locality or whether a jury panel is a fair and impartial jury than he is to decide whether a particular juror is capable of giving him a fair trial. See also Brown v. Peppersack, 334 F.2d 9 for the proposition that counsel had the authority to refuse to request a change of venue to a particular county rather than to move generally. Counsel is no more required to request a change of venue because the defendant so requests than he is to call a certain witness because the defendant so requests. These

are decisions to be made by counsel and they are frequently hard decisions. Should the decision prove to be erroneous, the defendant cannot say that he was denied the effective assistance of counsel. Effective assistance does not mean successful assistance, Edwards v. U.S., 256 F.2d 707. Therefore, even if the petitioner did request his court-appointed counsel to request a change of venue and his court-appointed counsel refused, and even if counsel's refusal constituted bad judgment, the petitioner is entitled to no relief.

CONCLUSION

It is respectfully submitted that a spurious attempt to invoke the jurisdiction of a State Supreme Court to review the decision of an intermediate appellate court of final appellate jurisdiction does not extend the time provided by 28 USC, Section 2101 (d), as implemented by Rule 22 of the Supreme Court Rules, within which a petition for Writ of Certiorari must be filed in order for this Court to have jurisdiction when the State Supreme Court was patently without jurisdiction; that it is not a denial of due process for the State to deny a post-conviction evidentiary hearing in a capital case merely because petitioner has alleged that extensive publication of his televised extrajudicial confession, together with other prejudicial publicity, deprived him of a fair trial on the question of whether the jury would recommend mercy when the record conclusively refutes said allegation; and that the

petitioner was not denied the effective assistance of counsel in that his court-appointed counsel refused to request a change of venue though requested to do so by the petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response to the Petition for Writ of Certiorari was mailed to the Honorable Richard Kanner, Attorney at Law, 1390 N.W. 14th Avenue, Miami, Florida, Attorney for Petitioner, this 20th day of January, 1967.

James T. Carlisle

JAMES T. CARLISLE
of Counsel

IN THE SUPREME COURT OF

THE UNITED STATES

October Term, 1966

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jurer is sworn, but before any evidence is presented.

History.—[1st, ch. 13924, 1929; CGL 1940 Supp. 9[illegible].

913.05 How challenge to individual juror to be made.—A challenge to an individual juror may be oral. When a juror is challenged for cause the ground for challenge shall be stated.

History.—[1st, ch. 13924, 1929; CGL 1940 Supp. 9[illegible].

913.06 How challenge to individual juror to be tried.—Challenges to an individual juror shall be tried by the court.

History.—[1st, ch. 13924, 1929; CGL 1940 Supp. 9[illegible].

913.07 Examination of witness on trial of challenge to individual juror.—Upon the trial of a challenge to an individual juror for cause the juror challenged and any other material witnesses produced by the parties shall be examined on oath by the court and may be so examined by either party.

History.—[1st, ch. 13924, 1929; CGL 1940 Supp. 9[illegible].

913.08 Number of peremptory challenges.—The state and the defendant shall each be allowed the following number of peremptory challenges:

(1) Ten, if the offense charged is punishable by death or imprisonment for life;

(2) Six, if the offense charged is a felony not punishable by death or imprisonment for life;

(3) Three, if the offense charged is a misdemeanor.

(4) If two or more defendants are jointly tried each defendant shall be allowed the number of peremptory challenges specified above and in such case the state shall be allowed as many challenges as are allowed to all of the defendants.

History.—[1st, ch. 13924, 1929; CGL 1940 Supp. 9[illegible].

913.09 Effect of sustaining challenge to individual juror.—If a challenge to an individual juror is sustained he shall be discharged from the trial of the cause.

History.—[1st, ch. 13924, 1929; CGL 1940 Supp. 9[illegible].

913.10 Number of jurors and alternate jurors.—

(1) Twelve men shall constitute a jury to try all capital cases, and six men shall constitute a jury to try all other criminal cases.

(2) When in the opinion of the court a trial is likely to be a protracted one, the presiding judge of such court may direct that one or two jurors, in addition to the regular panel, be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination, shall take the same oath and shall have the same functions, powers, facilities and privileges as the principal jurors. An alternate juror, who does not replace a principal juror, shall be discharged at the time the jury retires to consider its verdict. If one or two alternate jurors are called, each party is entitled to one peremptory challenge in addition to those otherwise allowed by law for each alternate juror so called. The additional peremptory challenge may be used only against the alternate juror and the other peremptory challenges allowed by law shall not be used against the alternate jurors.

History.—[1st, ch. 13924, 1929; CGL 1940 Supp. 9[illegible].

913.11 Oath of jurors.—The following oath shall be administered to the jurors: "Do you solemnly swear (or affirm) that you will well and truly try the issues between the State of Florida and the defendant whom you shall have in charge and a true verdict render according to the law and the evidence, so help you God."

If any juror affirms, the clause "so help you God" shall be omitted.

History.—[1st, ch. 13924, 1929; CGL 1940 Supp. 9[illegible].

CHAPTER 924, APPENDIX—RULES OF CRIMINAL PROCEDURE

Rule
1. Motion to vacate, set aside or correct sentence [New].
2. Criminal practice by senior law students [New].

Rule No. 1. Motion to vacate, set aside or correct sentence [hearing] appeal

A prisoner in custody under sentence of a court established by the Laws of Florida claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or Laws of the United States, or of the State of Florida, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting attorney of the court, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the appropriate appellate court from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this rule, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

This rule shall not apply to municipal courts.

The foregoing rule shall become effective upon the filing of this order.

Criminal Procedure Rule No. 1 approved and adopted by the Supreme Court of Florida in a per curiam order dated April 1, 1948. See 131 So.2d 451.